Filed 3/1/10 In re A.H. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re A.H. et al., Persons Coming Under the Juvenile Court Law.	2d Juv. Nos. B217056, B217721 (Super. Ct. Nos. J-1285402, J-1285780) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD WELFARE SERVICES, Plaintiff and Respondent, v. MICHAEL A., Defendant and Appellant.	

Michael A. ("Father") appeals an order of the juvenile court declaring that his son A. is adoptable and terminating parental rights. (Welf. & Inst. Code, § 366.26, subd. (c)(1).)[1] In a consolidated appeal, Father appeals the court's disposition order regarding his newborn son D. We affirm the orders regarding each child.

[1] All further statutory references are to the Welfare and Institutions Code.

FACTS AND PROCEDURAL HISTORY

Dependency Proceedings Regarding A.

On January 10, 2008, 16-year-old D.H. ("Mother") gave birth to A. Father, 18 years old, had a violent relationship with Mother. On several occasions, he struck Mother in the face, and once scalded her with hot water.

On May 15, 2008, Father shook four-month-old A. and submerged him in scalding water as punishment for crying. Mother sought emergency medical care for A.'s second and third degree head and facial burns. A.'s eyes were swollen shut and he suffered blisters as his skin peeled from his head and face. He received treatment at a burn center involving debridement of his lesions and sedation for extreme pain.

On May 19, 2008, Santa Barbara County Child Welfare Services ("CWS") filed a dependency petition on behalf of A. CWS alleged that A. suffered serious physical harm in the care of his parents, among other allegations. (§ 300, subds. (a), (b), (e), (g), (i).)

On May 20, 2008, the juvenile court held a detention hearing. Mother and Father attended the hearing and received appointed counsel. Father had been incarcerated on criminal charges of torture and felony child abuse regarding A. The parties stipulated to A.'s detention.

The S. family received A. in foster care following his release from pediatric intensive care. They received training from A.'s physicians to care for his burns and wounds. S. family members provided care for A.'s extraordinary needs occasioned by the abuse, which they described as "spend[ing] 24 hours a day 7 days a week [with A.]" A. suffered from post-traumatic stress syndrome, began to evidence developmental delays occasioned by the trauma, and harbored an extreme fear of water and heat.

On September 18, 2008, the juvenile court held a contested jurisdiction hearing. Mother was represented by counsel and a guardian ad litem. Physicians testified regarding the nature and extent of A.'s injuries and the possibility of residual scarring, deformity, and permanent hair loss. The court declared Father the presumed

father of A., sustained the allegations of the dependency petition, and continued A. in foster care.

Indian Child Welfare Act (25 U.S.C. 1901 et seq.) ("ICWA")

At the detention hearing, Mother stated that she has Umatilla or Colville Indian heritage. Father stated that he is an enrolled member of the Tlingit Indian tribe. On June 5, 2008, CWS sent notice on Judicial Council Form ICWA-030 ("Notice of Child Custody Proceeding for Indian Child"), including a copy of the dependency petition, to the Bureau of Indian Affairs and the Colville, Umatilla, and Tlingit Indian tribes. On July 23, 2008, CWS filed signed postal return receipts with the juvenile court. On June 7, 2008, the Umatilla tribe responded that A. was neither enrolled nor eligible for enrollment. The Colville tribe did not respond. A representative from the Tlingit tribe contacted CWS and requested additional information and notice of hearings.

On October 23, 2008, the juvenile court held a contested disposition hearing. CWS recommended that pursuant to the bypass provisions of section 361.5, subdivision (b)(5) and (6), neither Mother nor Father receive family reunification services. CWS described its recent efforts to engage Mother and Father in therapeutic services. Despite referrals from CWS, Mother did not attend domestic violence counseling or parent education classes. She was pregnant again and was dismissed from high school. Father remained incarcerated. A CWS social worker telephoned him in jail and left messages inviting a return collect telephone call. Father did not return the calls nor did he complete and return a parent education packet.

CWS also informed the juvenile court of its placement evaluations of A.'s Indian relatives. A.'s paternal grandmother ("Grandmother") sought placement but insisted that Father did not cause A.'s injuries. She also believed that Father should be permitted to have a relationship with A. CWS rejected A.'s paternal grandfather ("Grandfather") because he has a felony criminal conviction of assault with a deadly weapon.

The juvenile court received into evidence CWS reports and testimony from Mother and from ICWA expert, Elizabeth Morales. Morales testified that good cause

existed to deviate from the placement preferences of the ICWA. The Tlingit tribe neither appeared nor filed a written response. Following presentation of evidence and argument, the court found that CWS made active efforts to prevent the breakup of an Indian family and it ordered that CWS bypass family reunification services. The court also found good cause to deviate from ICWA placement preferences. The court then set the matter for a permanent plan hearing.

On October 30, 2008, the Tlingit tribe filed a notice of intervention in the dependency proceeding but did not serve the notice upon any party. The tribe acknowledged receipt of notices and documents already filed and requested continuing notice. The tribe demanded that CWS obtain an ICWA expert and provide active remedial services to Father.

In its permanent plan report, CWS recommended adoption as the permanent plan for A. The S. family intended to adopt him and was committed to maintaining his tribal connections and relationship with his paternal grandparents. Mr. S. also has Indian ancestry and recognizes the importance of Indian heritage.

On May 21, 2009, Father pleaded nolo contendere to felony child abuse and admitted inflicting great bodily injury upon A. The criminal court sentenced Father to serve a seven year prison term, which will be served with limited custody credits.

On June 4, 2009, the juvenile court held a contested permanent plan hearing and received evidence of CWS reports and testimony from Mother, Father, A.'s paternal aunt ("Aunt"), and ICWA expert Morales. A representative of the Tlingit tribe appeared by telephone conference call.[2] The tribal representative filed a written demand that CWS honor the Indian placement scheme of 25 U.S.C. section 1915(b).

Mother testified that she preferred that A. be placed with his biological family. Father testified that he has "learned to become a better father" during his incarceration. He stated that upon his release, he planned to reside with his brother and

[2] Earlier, the juvenile court concluded that CWS had provided timely notice to the tribe of the proceedings during the dependency. The judge stated that "the idea that somehow [CWS] has not been forthcoming in providing you with information is not accurate."

he intended to visit A. Aunt testified that CWS had placed newborn D. (*post*) with her, and that she was requesting placement of A. because CWS would not approve her mother's application. Aunt stated that she worked 10 hours daily and left D. in the care of her brother. She conceded that it might be best for A. to remain with the S. family.

Following argument, the juvenile court concluded by clear and convincing evidence that A. is adoptable and terminated parental rights. (§ 366.26, subd. (c)(1).)

Dependency Proceedings Regarding D.

On December 17, 2008, Mother gave birth to D. On December 23, 2008, CWS filed a dependency petition alleging that Mother and Father were involved in dependency proceedings regarding A. (§ 300, subds. (b), (g), (j).) CWS also alleged that Mother did not obtain prenatal care. CWS mailed notice of the detention hearing to the Colville, Umatilla, and Tlingit Indian tribes. The juvenile court detained D. and authorized placement in a relative home or foster care.

Prior to the contested jurisdiction hearing, CWS recommended that family reunification services not be provided to Father pursuant to section 361.5, subdivision (b)(7) and (11).

At the June 22, 2009 contested jurisdiction and disposition hearing, the juvenile court received evidence of CWS reports and testimony from ICWA expert Morales regarding CWS's efforts to prevent the breakup of an Indian family. Earlier that month, CWS had removed D. from a foster home and placed him in Aunt's care. The Tlingit Indian tribe filed written reports with the court demanding ICWA placement preference.

At the conclusion of the hearing, the juvenile court determined that CWS had made active efforts to prevent the breakup of the Indian family. It sustained the allegations of the dependency petition, ordered CWS to provide family reunification services to Mother, and ordered that Father receive no reunification services.

Father appeals and contends that: 1) the juvenile court erred by bypassing family reunification services; 2) the juvenile court erred by finding good cause to deviate from ICWA placement preferences; and 3) CWS failed to file copies of the ICWA

notices sent to Mother's designated Indian tribe. Mother has not appealed. For this reason, we do not discuss asserted errors regarding her. Counsel for the children joins the CWS response.

DISCUSSION

I.

Father argues that section 361.7 requires that he receive reunification services despite the bypass provisions of section 361.5. He acknowledges that *In re K.B.* (2009) 173 Cal.App.4th 1275, 1284, concludes that active services need not be provided when to do so would be futile, but argues that the decision is wrongly decided. Father adds that provision of services to him would not be futile, given his young age and strong family support.

Section 361.7, subdivision (a) provides: "Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Subdivision (b) provides: "What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers." Whether the services provided amount to "active efforts" is a question of law that we decide independently. (*In re K.B.*, *supra*, 173 Cal.App.4th 1275, 1286.)

The juvenile court properly found that CWS made active efforts within the meaning of section 361.7, under the circumstances of this case. "Active efforts" refer to "timely and affirmative steps . . . to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy problems which might lead to severance of the parent-child relationship."

(*Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016.) There may be instances--such as here--where it is not possible to prevent the breakup of an Indian family because provision of services would be an idle act. Father pleaded nolo contendere to felony child abuse and expressly admitted that he inflicted great bodily injury upon his child. As a consequence of his plea, he will be imprisoned for nearly seven years. Remedial services to prisoners are limited and Father does not suggest any services that may be useful to a convicted child abuser who has scalded his child. Requiring the court to provide services to attempt to remove human cruelty would be fruitless and would not promote the purposes of ICWA.

In re K.B., supra, 173 Cal.App.4th 1275 is persuasive. There the reviewing court held that reunification services may be denied to a parent of an Indian child where it would be futile to provide services. (*Id.* at p. 1284.) *K.B.* noted that the active efforts requirement "was not intended as a shield to permit abusive treatment of Indian children by their parents." (*Id.* at p. 1285.)

CWS left telephone messages for Father during his incarceration and invited a collect return telephone call. Father did not respond. CWS also mailed Father a parent education workbook. Although Father testified that he returned the workbook, the social worker stated that he did not. As with other matters of disputed fact, we view the evidence most favorably to the order. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53 [test of substantial evidence].)

II.

Father argues that the juvenile court erred by finding good cause to deviate from the ICWA placement preferences set forth in section 361.31, subdivision (c) and 25 U.S.C. section 1915(a). He asserts that CWS did not diligently seek a Tlingit relative or an Indian foster home. Father adds that CWS failed to seek a waiver of Grandfather's criminal record. (*In re Jullian B.* (2000) 82 Cal.App.4th 1337, 1346-1347 [in ICWA cases the agency must seek a waiver of a relative's criminal conviction or explain why it did not do so].) In sum, Father argues that the juvenile court improperly relied upon

faulty relative assessments as well as A.'s bond with his foster parents as good cause to deviate from the ICWA placement preference.

25 U.S.C. section 1915(b) sets forth preferred foster care placements for Indian children. In order of preference, these include a member of the child's extended family, a foster home licensed or approved by the Indian tribe, an Indian foster home licensed or approved by a non-Indian licensing authority, or an institution approved by an Indian tribe or operated by an Indian organization. Placement may deviate from these preferences providing that "good cause" exists. (*Ibid.*) We review the determination of good cause to deviate from the ICWA placement preference for sufficient evidence. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 645.)

Sufficient evidence supports the determination of good cause. CWS placed A. in the S. home as an emergency placement due to his life-threatening and severe injuries. Father did not admit paternity and requested genetic testing. The S. family cared for A.'s serious injuries and developmental delays occasioned by the trauma, and he thrived in their care. (*Fresno County Dept. of Children & Family Services v. Superior Court*, *supra*, 122 Cal.App.4th 626, 645 ["good cause" often includes considerations affecting the best interests of the child].)

Moreover, the juvenile court properly found that CWS exercised diligence in assessing Indian placement for A. CWS explained that Grandmother insisted that Father was innocent and believed that he should have a relationship with A, and that Grandfather had a criminal record. The Tlingit notice of intervention demanded that A. be placed with Grandmother or Grandfather and did not suggest alternative foster homes. Grandmother and Grandfather did not file a motion to modify placement nor did they object to the CWS assessment regarding them. They may not complain now.

III.

Father contends that CWS did not provide the juvenile court with copies of the ICWA notices sent to Mother's designated Indian tribes in D.'s dependency. (§ 224.2, subd. (c) [proof of the notice, return postal receipts, and tribal responses must be filed

with the court].) He adds that Mother's ICWA notices in A.'s dependency were incomplete because they did not contain the tribal enrollment numbers for Grandmother and great-grandmother, and the date and place of death of the great-great-grandfather.

During the pendency of the appeal, we granted CWS's request to augment the appellate record to include an addendum report filed in the juvenile court on January 28, 2010, containing a response from the Umatilla Indian tribe dated January 5, 2010. The response states that D. is neither enrolled nor eligible for enrollment. The response also refers to enrollment criteria requiring a parent or grandparent to be enrolled. Mother was not an enrolled member and the maternal grandmother informed CWS that she had not yet enrolled. In view of the Umatilla response, any error in the ICWA notices or in filing copies of the notices with the court is harmless. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624 [test of harmless error].)

The orders are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

James E. Herman, Judge

Superior Court County of Santa Barbara

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Dennis A. Marshall, County Counsel, Maria Salido Novatt, Sr. Deputy, Toni Lorien, Deputy County Counsel, for Plaintiff and Respondent.

Kelly & Hubner, LLP, Carol L. Hubner for Minors.